IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

JEFFREY DRISCOLL,
Plaintiff/Appellee,

v.

THE STATE OF ARIZONA,
Defendant/Appellant.

No. 2 CA-CV 2021-0137
Filed May 17, 2023

THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
NOT FOR PUBLICATION
See Ariz. R. Sup. Ct. 111(c)(1); Ariz. R. Civ. App. P. 28(a)(1), (f).

Appeal from the Superior Court in Pima County
No. C20182551
The Honorable Paul E. Tang, Judge
The Honorable Gary J. Cohen, Judge

AFFIRMED

COUNSEL

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MEMORANDUM DECISION

Vice Chief Judge Staring authored the decision of the Court, in which Judge O'Neil and Judge Gard concurred.

S T A R I N G, Vice Chief Judge:

¶1 The state appeals from a jury verdict in favor of Jeffrey Driscoll on his vicarious liability claim arising from a motor vehicle accident. For the following reasons, we affirm.

Factual and Procedural Background

¶2 In October 2017, Driscoll, a commercial truck driver, was driving a semi-truck and collided with Courtney Sanford, an Arizona Department of Corrections (ADOC) officer, who was driving a state-owned vanpool van. Sanford died in the accident, and Driscoll sustained injuries. At the time of the accident, Sanford was returning the van to its designated parking spot at a police station in Arizona City.

¶3 The state's vanpool program was available to ADOC employees who lived at least fifteen miles from their work site. The state owned and maintained the vans and coordinated the assignment of vanpool participants and routes. An objective of the program was to incentivize the hiring and retention of state employees by lessening the burden of commuting to work at remote prison facilities. Participants were required to comply with the terms and conditions of the program, which included not making detours, not smoking in the vans, not transporting people who were not participants in the vanpool program, and parking the vans in designated spots when not in use.

¶4 Driscoll sued the state alleging vicarious and direct liability. Specifically, he asserted claims of negligence, negligent hiring and supervision, negligent entrustment, and negligence per se. The state moved

for summary judgment, arguing Sanford had not been acting in the course and scope of her employment at the time of the accident and no evidence supported Driscoll's claims that it was directly liable for the collision. The trial court granted the motion as to the direct liability claims but denied it as to vicarious liability.

¶5 After trial, the jury returned a verdict in favor of Driscoll and found the full amount of damages to be $981,908. The jury apportioned fault to Sanford in the amount of 73.75 percent and to Driscoll in the amount of 16.875 percent.[1] Taking into account the apportionment of fault, the court awarded Driscoll $724,157.15 in damages. The state appealed, and Driscoll filed a motion for partial dismissal, which we took under advisement and address below. We have jurisdiction pursuant to A.R.S. §§ 12-120.21(A)(1) and 12-2101(A)(1).

Discussion

¶6 On appeal, the state argues the trial court erred in denying its motions for summary judgment and judgment as a matter of law, in refusing to instruct the jury that work-related control is required to impose vicarious liability, and in allowing Driscoll's expert witness to testify as to the reasonableness and amounts of his medical bills.

Jurisdiction

¶7 Driscoll moved for partial dismissal of this appeal, arguing we lack jurisdiction to review the trial court's denial of the state's motions for summary judgment and judgment as a matter of law. We have a "duty to review [our] jurisdiction and, if jurisdiction is lacking, to dismiss the appeal." *Davis v. Cessna Aircraft Corp.*, 168 Ariz. 301, 304 (App. 1991).

Motion for Summary Judgment

¶8 "Generally, the denial of a summary judgment motion is not reviewable on appeal from a final judgment entered after a trial on the merits." *John C. Lincoln Hosp. & Health Corp. v. Maricopa County*, 208 Ariz. 532, ¶ 19 (App. 2004). "An appellate court may, however, review a trial court's denial of summary judgment in a case that has gone to trial if the denial is based on a purely legal issue or if the proponent reasserts the issue in a Rule 50, Ariz. R. Civ. P., motion for judgment as a matter of law or other

[1]The jury apportioned the remaining 9.375 percent of the fault to an entity not involved in this appeal.

post-trial motion." *Desert Palm Surgical Grp., P.L.C. v. Petta*, 236 Ariz. 568, ¶ 22 (App. 2015); *see also* Ariz. R. Civ. P. 50(a). A purely legal issue is "one that does not require the determination of any predicate facts, namely, 'the facts are not merely undisputed but immaterial.'" *John C. Lincoln Hosp. & Health Corp.*, 208 Ariz. 532, n.5 (quoting *Seidel v. Time Ins. Co.*, 970 P.2d 255, 257 (Or. Ct. App. 1998)).

¶9 In its motion for summary judgment, the state argued that under the "going and coming rule," Sanford had not been acting in the course and scope of her employment at the time of the accident. Specifically, it urged, she had not been under the "work-related control of the State"—rather, she was "going home from work." Then, at trial, the state moved for judgment as a matter of law, arguing there was "simply no evidence that . . . Sanford, who was engaged in the van pool, was under the work-related control of the [ADOC] at the time of the accident."

¶10 Driscoll argues on appeal that the trial court's "denial of summary judgment is not reviewable because the case proceeded to trial" and the motion involved "critically fact-dependent" rather than purely legal issues. Whether an employee is within the scope of his or her employment generally involves questions of fact and is only a question of law if "the conduct was clearly outside the scope of employment." *See Smith v. Am. Express Travel Related Servs. Co.*, 179 Ariz. 131, 136 (App. 1994). But regardless, the state preserved the summary judgment issue—whether Sanford was acting within the course and scope of her employment at the time of the accident—by re-raising it in its Rule 50(a) motion. Thus, we have jurisdiction to review the court's denial of the state's motion on Driscoll's vicarious liability claims. *See Desert Palm Surgical Grp.*, 236 Ariz. 568, ¶ 22.

Motion for Judgment as a Matter of Law

¶11 Judgment as a matter of law is appropriate under Rule 50(a) when "a party has been fully heard on an issue during a jury trial and the court finds that a reasonable jury would not have a legally sufficient evidentiary basis to find for the party on that issue." And if "the court does not grant a motion for judgment as a matter of law made under Rule 50(a)," then "[n]o later than 15 days after the entry of judgment . . . the movant may file a renewed motion for judgment as a matter of law and may include an alternative or joint request for a new trial under Rule 59." Ariz. R. Civ. P. 50(b); Ariz. R. Civ. P. 59.

¶12 Pursuant to A.R.S. § 12-2102(C), "the supreme court shall not consider the sufficiency of the evidence to sustain the verdict or judgment in an action tried before a jury unless a motion for a new trial was made." Our appellate jurisdiction is similarly restricted by § 12-2102. *See Marquette Venture Partners II, L.P. v. Leonesio*, 227 Ariz. 179, ¶ 7 (App. 2011). While a Rule 50(b) motion satisfies the "motion for a new trial" requirement under § 12-2102(C), a Rule 50(a) motion, which does not allow the trial court to order a new trial, fails to satisfy § 12-2102(C)'s jurisdictional requirement. *Marquette Venture Partners*, 227 Ariz. 179, ¶¶ 9, 13. Here, the state did not renew its motion for judgment as a matter of law pursuant to Rule 50(b) or move for a new trial under Rule 59. Accordingly, we lack jurisdiction to review the court's denial of the state's motion for judgment as a matter of law.

Denial of Summary Judgment

¶13 The state argues the trial court erroneously denied its motion for summary judgment with respect to Driscoll's vicarious liability claims. It reasons that Sanford could not have been acting within the course and scope of her employment given that the state exerted no work-related control over her at the time of the collision and because the going and coming rule bars such liability in this case. "We review de novo whether summary judgment is appropriate," *Rogers v. Mroz*, 252 Ariz. 335, ¶ 11, *cert. denied*, ___ U.S. ___, 142 S. Ct. 2781 (2022); *see Glazer v. State*, 237 Ariz. 160, ¶ 29 (2015),[2] confining our review to the record before the court at the time of its ruling, *see Brookover v. Roberts Enters., Inc.*, 215 Ariz. 52, ¶ 8 (App. 2007).

¶14 Summary judgment is proper when "the moving party shows that there is no genuine dispute as to any material fact and the moving party is entitled to judgment as a matter of law." Ariz. R. Civ. P. 56(a). Where the burden of proof on the claim or defense at trial rests on the non-moving party, the party moving for summary judgment need not "present evidence disproving the non-moving party's claim or defense." *Nat'l Bank of Ariz. v. Thruston*, 218 Ariz. 112, ¶ 22 (App. 2008). Rather, the moving party is only required to "'point out by specific reference to the relevant discovery that

[2]Alternative case authority states that the standard of review of the denial of a motion for summary judgment is an abuse of discretion. *See, e.g., Sonoran Desert Investigations, Inc. v. Miller*, 213 Ariz. 274, ¶ 5 (App. 2006). However, we need not address this distinction as we conclude the trial court did not err under either standard.

no evidence exist[s] to support an essential element of the [non-moving party's] claim' or defense." *Id.* (alteration in *Thruston*) (quoting *Orme Sch. v. Reeves*, 166 Ariz. 301, 310 (1990)).

¶15 In a negligence action, the burden of proof is on the plaintiff. *Berne v. Greyhound Parks of Ariz., Inc.*, 104 Ariz. 38, 39 (1968). And "an employer may be held vicariously liable on the theory of respondeat superior for negligent driving of a vehicle by its employee if the facts establish an employer-employee relationship and the negligence of the employee occurred during the scope of her employment." *Carnes v. Phx. Newspapers, Inc.*, 227 Ariz. 32, ¶ 9 (App. 2011). "In tort actions arising out of vehicular accidents, our supreme court has explained that a 'basic test' to determine applicability of respondeat superior is whether the employee is 'subject to the employer's control or right to control' at the time of the negligent driving." *Id.* ¶ 10 (quoting *State v. Superior Court*, 111 Ariz. 130, 132 (1974)).

¶16 In *Engler v. Gulf Interstate Engineering, Inc.*, 230 Ariz. 55, ¶ 13 (2012), the supreme court elaborated on the appropriate test "for evaluating whether an employee is acting within the scope of employment." Namely, "[a]n employee's tortious conduct falls outside the scope of employment when the employee engages in an independent course of action that does not further the employer's purposes and is not within the control or right of control of the employer." *Id.* ¶ 13; *see also* Restatement (Third) of Agency § 7.07 (2006) (Mar. 2023 update). The "relevant factors for determining whether the employer exercised actual control or retained the right to control" include "whether the act (a) was the kind the employee was hired to perform, (b) was commonly done by the employee, (c) occurred within the employee's working hours, and (d) furthered the employer's purposes." *Engler*, 230 Ariz. 55, ¶ 11.

¶17 "Because an employee is usually not subject to the employer's control or right of control when commuting to or from work, our supreme court has adopted the 'going and coming rule,'" which provides that an employer is not liable for an employee's tortious acts when an employee is going to or returning from her place of employment. *Carnes*, 227 Ariz. 32, ¶ 11. But unless "the undisputed facts indicate that the conduct was clearly outside the scope of employment," "[w]hether an employee's tort is within the scope of employment is generally a question of fact." *Smith*, 179 Ariz. at 136.

¶18 In its motion for summary judgment, the state argued Sanford had not been in the course and scope of her employment at the time of the

accident because she "was off-the-clock" and "on her way home" after "finishing her shift." It continued that she had been "merely taking advantage of an employer-provided travel benefit" and concluded that "nothing about this case tends to remove it from the well settled going and coming rule for respondeat superior liability in tort cases." In opposition, Driscoll asserted Sanford had been within the course and scope of her employment because, at the time of the accident, she was "driving a state-owned vehicle to the Arizona City Police Station, where the van would be parked prior to [her] driving her own vehicle home." The parties disputed numerous facts related to this issue, including whether Sanford had been driving home, whether the sole benefit of the vanpool program was to the employee, whether vanpool drivers were required to drive designated routes, and whether Sanford had been off-clock and off-duty at the time of the accident.

¶19 The trial court denied the state's motion for summary judgment on Driscoll's vicarious liability claim, reasoning that questions of material fact existed as to whether "Sanford, while operating a [state] van on the way to a designated [state] parking lot at the Arizona City parking area, amounted to activity of her coming or going to work so that at the time of her collision with Mr. Driscoll, she was an employee said to have been acting outside the course and scope of her employment." Moreover, it continued, the fact finder must determine whether Sanford "was subject to [state] control at the time of the accident" based on various factors, including that, while driving the van, she was prohibited from running errands, making intermediate stops, and transporting people not participating in the program. Other relevant factors included that Sanford was required to take the most "expedient route" and park the van in a designated spot. The court further noted that the state owned, issued, and maintained the vans and that Sanford had been required to apply and qualify to participate in the vanpool program. Finally, it concluded there was a question of fact as to whether Sanford had been "operating the van and acting in a manner that might be considered an independent course of conduct not intended . . . to serve any purpose of" ADOC.

¶20 On appeal, the state argues the trial court erred in denying its motion for summary judgment on Driscoll's vicarious liability claim because ADOC did not have the requisite work-related control over Sanford. Further, it contends, the court erred in failing to apply the going and coming rule. We disagree.

¶21 We cannot conclude the trial court erred in partially denying the state's motion for summary judgment. The "undisputed facts" did not "indicate that the conduct was clearly outside the scope of employment," *Smith*, 179 Ariz. at 136, and, given the multiple state-imposed regulations concerning the operation of vanpool vans and actions of program participants, it was not clear that the going and coming rule applied. The court properly left the issue of vicarious liability for the trier of fact.[3]

Jury Instruction

¶22 The state also argues the trial court "gave an erroneous jury instruction on scope of employment." "A trial court must give a requested instruction if: (1) the evidence presented supports the instruction, (2) the instruction is proper under the law, and (3) the instruction pertains to an important issue, and the gist of the instruction is not given in any other instructions." *DeMontiney v. Desert Manor Convalescent Ctr. Inc.*, 144 Ariz. 6, 10 (1985). We review "a refusal to give a requested jury instruction for an abuse of discretion and will not reverse if the requesting party cannot show resulting prejudice." *Dupray v. JAI Dining Servs. (Phx.), Inc.*, 245 Ariz. 578, ¶ 22 (App. 2018).

¶23 As discussed, our supreme court adopted Restatement § 7.07 upon concluding it "sets forth the appropriate test for evaluating whether an employee is acting within the scope of employment." *Engler*, 230 Ariz. 55, ¶ 13. Under § 7.07, "An employee acts within the scope of employment when performing work assigned by the employer or engaging in a course of conduct subject to the employer's control," and an act "is not within the scope of employment when it occurs within an independent course of conduct not intended by the employee to serve any purpose of the employer."

¶24 In *Engler*, our supreme court held "that because the employee was not subject to his employer's control, he was not acting within the scope of his employment at the time of the accident and the employer is therefore not liable for his actions." 230 Ariz. 55, ¶ 1. There, the employee lived in Texas but was staying in a hotel in Yuma for his daily commute to work in Mexico. *Id.* ¶ 2. The employer reimbursed the employee for all of his travel-related expenses. *Id.* ¶ 3. One evening, after returning from work to his hotel, the employee went to dinner and was involved in an accident while driving back to the hotel. *Id.* ¶ 4. To determine whether the employee was

[3]Given our conclusion, we need not address the state's arguments concerning the inapplicability of exceptions to the going and coming rule.

in the course and scope of his employment, the court applied the test set forth in Restatement § 7.07, considering whether the employer had exercised control over the employee at the time of the accident. *Id.* ¶ 14. Specifically, it considered whether the employee had been serving the employer's interest in going to dinner and whether the employer controlled "where, when, or even if [the employee] chose to eat dinner." *Id.* The court concluded the employee had been "engaged in an independent course of action not intended to serve his employer's work purposes" and, thus, the employer was "not vicariously liable." *Id.*

¶25 In the case at hand, the state objected to the trial court's proposed jury instruction on respondeat superior, which read:

> The State of Arizona is responsible for the actions of Arizona Department of Corrections employee Courtney Sanford if she was acting within the scope of her employment when the collision at issue occurred.
>
> Jeffrey Driscoll claims that the State of Arizona is responsible for the actions of Courtney Sanford when the collision at issue occurred. To establish this claim, [he] must prove that:
>
> When the collision happened, Courtney Sanford was performing work assigned by her employer or engaging in a course of conduct subject to the employer's control. An employee's act is not within the scope of employment when it occurs within an independent course of conduct not intended by the employee to serve any purpose of the employer.

The state argued this language did not instruct the jury on the "work-relatedness requirement [f]or respondeat superior" and urged the court to modify the instruction. The court declined to modify the instruction to state that an employer must have "work-related control" over an employee's course of conduct, explaining *Engler* "clearly adopt[ed]" Restatement § 7.07 as the test for determining course and scope of employment. The court continued that the instruction accurately stated the *Engler* test and that adding the requested language "would misstate the law."

¶26 On appeal, the state contends the trial court should have instructed the jury that in order to establish the state's vicarious liability, Driscoll was required to prove Sanford had been "performing work assigned by her employer or engaging in a course of conduct subject to the employer's *work-related* control." It continues that without this clarification, the court risked confusing the jury on the "scope of respondeat-superior liability" because control "untethered from the specifics of the job" is "not what *Engler* or Restatement § 7.07 contemplated as relevant" and the "jury heard undisputed evidence that Sanford was subject to the [state]'s control unrelated to her job." The state also contends that "[u]nder the test actually given to the jury, the course of conduct (*i.e.*, Sanford's actions) did not need to be work-related, and neither did AD[O]C's control over them." We disagree.

¶27 The jury instruction accurately conveyed that the state could only be liable for Sanford's work-related actions. *See Engler*, 230 Ariz. 55, ¶ 9. It specified that Sanford must have been in the course and scope of her employment for the state to be liable and that the state was not liable for Sanford's independent course of conduct.

¶28 And to the extent the state argues an employer's general control over an employee cannot bring an employee's actions within the course and scope of employment and a special kind of "work-related" control is required, we once again disagree. In addition to an employee's acts when "performing work assigned by the employer," Restatement § 7.07 includes an employee's acts when "engaging in a course of conduct subject to the employer's control"—not an employer's *work-related* control. Indeed, in *Engler*, our supreme court considered whether the employer had control over "where, when, or even if" the employee chose to eat dinner in applying the test set forth in § 7.07. 230 Ariz. 55, ¶ 14.

¶29 In this case, as noted above, the state exercised significant control over the manner in which the vanpool vans were operated, and the vanpool program was intended to benefit the state in connection with its ability to recruit and retain employees. Thus, we cannot conclude the trial court abused its discretion in not giving the state's requested jury instruction. *See id.* ¶ 13; Restatement § 7.07.

Medical Bills

¶30 The state argues Driscoll "failed to prove damages in the form of medical expenses" because his expert witness did not have the necessary personal knowledge to "testify about the reasonableness of the billed

amounts" and the trial court "abused its discretion by allowing [the expert] to testify about the otherwise inadmissible medical bills." We will not disturb the court's admission of evidence absent a clear abuse of discretion and resulting prejudice. *See Selby v. Savard*, 134 Ariz. 222, 227 (1982); *see also State v. Tucker*, 215 Ariz. 298, ¶ 58 (2007). "The improper admission of evidence is not reversible error if the jury would have reached the same verdict without the evidence." *Brown v. U.S. Fid. & Guar. Co.*, 194 Ariz. 85, ¶ 7 (App. 1998). A legal error constitutes an abuse of discretion. *Shinn v. Ariz. Bd. of Exec. Clemency*, 254 Ariz. 255, ¶ 13 (2022).

¶31 Admission of medical bills requires a plaintiff to establish "(1) a causal connection between the medical bills and [the defendant]'s negligent conduct, (2) the treatment was necessary, and (3) the expenses were reasonable." *Fadely v. Encompass Health Valley of Sun Rehab. Hosp.*, 253 Ariz. 515, ¶ 36 (App. 2022); *see also Larsen v. Decker*, 196 Ariz. 239, ¶ 19 (App. 2000) (plaintiff must establish bills are "linked to the issues in th[e] case").

¶32 At trial, Bradley Brainard, M.D., testified about Driscoll's injuries, treatment, and medical bills. Specifically, Brainard testified to the amounts billed in connection with Driscoll's emergency room visit, shoulder surgeries, and physical therapy, while testifying about the reasonableness of those amounts and the necessity of the corresponding treatments. After allowing the state to voir dire Brainard on his knowledge concerning the reasonableness of each bill, the trial court overruled the state's objections that Brainard's testimony lacked foundation. Although Driscoll sought admission of some of the medical bills, the court sustained the state's objections based on lack of foundation and none of the bills were admitted into evidence. Despite the bills not being admitted, Brainard further testified that the total amount of Driscoll's medical bills was $158,585.40 and that those bills were "reasonable and customary for Tucson."

¶33 The trial court subsequently instructed the jury to "decide the full amount of money that w[ould] reasonably and fairly compensate . . . Driscoll for each of the following elements of damages proved by the evidence": the nature and extent of his injuries, pain and suffering, medical expenses incurred, decrease in earning capacity, loss of consortium, and loss of enjoyment of life. In closing argument, Driscoll asserted he was entitled to $1,428,845 in total damages including $158,585 for medical expenses. The jury found the total amount of damages to be $981,908.

¶34 The state argues the trial court "abused its discretion by allowing . . . Brainard to opine about the reasonableness of the amount of Driscoll's medical bills," claiming he did not have "firsthand knowledge of the billing practices or relevant criteria regarding the reasonable value of medical services." It further contends the "court compounded its error" by allowing "Brainard to disclose to the jury the precise amounts of each of the bills" when "the medical bills themselves were inadmissible because no adequate foundation had been laid."

¶35 Driscoll responds that for Brainard to testify as to "what reasonable and necessary bills Driscoll incurred, it was not required that the documents themselves be received in evidence," and, thus, "the amounts of the bills were properly communicated to the jury." Further, he argues, the state "has no basis to . . . complain that the amounts of the bills were improperly admitted" because, if it "had raised an objection to the amounts coming in through Dr. Brainard in advance of his testimony," he could have taken steps to admit the bills under the business records exception to the rule against hearsay, Rule 703, Ariz. R. Evid., "or some other rule." Driscoll asserts that, pursuant to Rule 703, "even if the amount[s] contained within the bills had been properly objected to and deemed inadmissible, they still held substantial probative value" and thus were properly disclosed to the jury. Alternatively, he argues, "Even if Dr. Brainard's testimony regarding the amounts of bills was improperly admitted, any hypothetical error was harmless due to the substantial evidence of other economic and general damages."

¶36 Under Rule 703, an expert "may base an opinion on facts or data in the case that the expert has been made aware of or personally observed." Those facts or data "need not be admissible for the opinion to be admitted" if "experts in the particular field would reasonably rely on those kinds of facts or data in forming an opinion on the subject." *Id.* However, the expert may disclose those facts and data "only if their probative value in helping the jury evaluate the opinion substantially outweighs their prejudicial effect." *Id.* Otherwise, inadmissible testimony disclosed under this rule may be admitted only "for the limited purpose of showing the basis of the expert's opinion." *Tucker*, 215 Ariz. 298, ¶ 58.

¶37 Even assuming Dr. Brainard was qualified to opine that Driscoll's medical bills were causally related to the accident, the treatment was necessary, and the amounts were reasonable, *see Fadely*, 253 Ariz. 515, ¶ 36, the contents of the medical bills were inadmissible as substantive evidence because the bills themselves were never admitted into evidence.

And, even if the billed amounts were permissibly disclosed to the jury under Rule 703, these amounts were only admissible to show the basis of Brainard's opinion. *See Tucker*, 215 Ariz. 298, ¶ 58. Thus, the trial court erred in allowing Brainard to testify to the amounts of Driscoll's medical bills as substantive evidence to be used in calculating his damages. *See Selby*, 134 Ariz. at 227; *Shinn*, 254 Ariz. 255, ¶ 13.

¶38 However, because the jury's calculation of damages did not necessarily include any of Driscoll's medical expenses, we cannot say the state was prejudiced by the trial court's error. The jury's verdict stated the total amount of damages, $981,908, without specifying how the jury calculated that amount. *Cf. Larriva v. Widmer*, 101 Ariz. 1, 7 (1966) (amount of damages "peculiarly within the province of the jury" and "will not be overturned or tampered with unless the verdict was the result of passion and prejudice"). Accordingly, having been asked by Driscoll for $1,428,845 in total damages, the jury could have completely disregarded his request for $158,585 in medical expenses and still concluded the total damages were $981,908. *See id.* at 6-7 ("[W]hen we do not know on what basis the jury reached its verdict, if there is any evidence to support a theory which will sustain same it must be affirmed on appeal." (quoting *Citizens Utils. Co. v. Firemen's Ins. Co.*, 73 Ariz. 299, 303 (1952))). And, this case is distinguishable from *Fadely*, in which we remanded for the trial court to recalculate damages by simply subtracting erroneously admitted medical bills for which the "court [had] held [the defendant] liable" following a bench trial. 253 Ariz. 515, ¶ 37. Here, remanding would require a new trial on the issue of damages, even though the record does not establish the jury found the state liable for medical expenses. *See Elliott v. Landon*, 89 Ariz. 355, 357 (1961) ("[I]n considering an appeal from a judgment based upon a general verdict it must be assumed that the jury passed upon every material issue of fact presented to them, and that the findings thereon were such as to support the verdict.").

¶39 Further, Driscoll presented sufficient evidence as to the other elements of damages to support the jury's award. Namely, Dr. Brainard testified about Driscoll's shoulder injuries, the operations he had endured on both shoulders, his lifting restrictions, his loss of external rotation in his shoulders, his increased risk of subsequent rotator cuff tears, and the possibility of further surgeries—including shoulder-replacement surgery. He also testified about Driscoll's difficulty sleeping and continued pain. Similarly, Driscoll testified about the rotator cuff tears in his shoulders and the pain and loss of strength he had experienced, even after surgery.

¶40 Additionally, Driscoll testified he had retired from his job in 2018 due to physical limitations resulting from his injuries, despite having no plans to retire prior to the collision. A vocational counselor opined Driscoll's total loss in earning capacity, reduced to present value, was $236,260. Further, Driscoll stated he could no longer participate in the same activities he had enjoyed before the accident and described how his injuries had impacted his mental health and relationships with his wife and grandchildren. Driscoll's friend also testified the collision had limited Driscoll's prior active lifestyle and negatively affected his mental health. Taken as a whole, and viewing the facts in the light most favorable to upholding the jury's verdict, as we must, there is sufficient testimony to support the jury's award of damages without consideration of the inadmissible medical bills. *See Valdez v. Delgado*, 254 Ariz. 495, ¶ 3 (App. 2019) ("We view the facts and the reasonable inferences therefrom in the light most favorable to upholding the jury's verdicts." (quoting *Crackel v. Allstate Ins. Co.*, 208 Ariz. 252, ¶ 3 (App. 2004))).

Attorney Fees

¶41 On appeal, Driscoll requests attorney fees pursuant to A.R.S. § 12-348 and costs pursuant to A.R.S. § 12-341. Driscoll fails to identify any applicable subsection of § 12-348, and we find none. We therefore decline to award attorney fees on this basis. *See* Ariz. R. Civ. App. P. 13(a)(7), (b); *Sholes v. Fernando*, 228 Ariz. 455, ¶ 16 (App. 2011) (failure to develop and support argument waives issue on appeal). However, as the successful party on appeal, Driscoll is entitled to his costs upon compliance with Rule 21, Ariz. R. Civ. App. P. *See* § 12-341.

Disposition

¶42 For the foregoing reasons, we affirm.